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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Di Bella v. *United States*, 369 U.S. 121 7

Jones v. *United States*, 362 U.S. 257 9

Segurola v. *United States*, 275 U.S. 106 8

United States v. *Chieppa*, 241 F. 2d 635, certiorari denied sub nom. *Iricola* v. *United States*, 353 U.S. 973 8

United States v. *Romero*, 249 F. 2d 371 8

United States v. *Rosen*, 293 F. 2d 938 8

Statute:

18 U.S.C. 472 ..... 2, 7, 8, 10

Miscellaneous:

F. R. Crim. P.:

Rule 41(e) 2, 7, 8

Rule 52 10

641481—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 887

THOMAS DI DONATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Gov. R., 132-138;[1] Pet. App. 23-29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1962 (Gov. R., 132; Pet. App. 30). The petition for a writ of certiorari was filed on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Gov. R." refers to the government's appendix in the court of appeals as supplemented by the proceedings in that court. "Def. R." refers to petitioner's appendix in the court of appeals.

QUESTIONS PRESENTED

1. Whether the district abused its discretion in refusing to entertain petitioner's oral motion to suppress evidence, made for the first time at the trial and after the evidence had already been admitted without objection.

2. Whether the district court properly instructed the jury on the presumption of innocence, reasonable doubt, and burden of proof.

RULE INVOLVED

Rule 41(e), F.R. Crim. P., provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained * * *. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York on a one-count indictment charging the possession and concealment on December 15, 1960, of falsely made and counterfeit Federal Reserve notes, in violation of 18 U.S.C. 472 (Def. R., 3). On December 20, 1961, petitioner was sentenced to imprisonment for five years (Def. R., 4; Pet. App. 30). The conviction

was affirmed by the court of appeals (Gov. R., 132–138; Pet. App. 23–29).

The pertinent facts may be summarized as follows:

1. In the early evening of December 15, 1960, two New York City detectives entered a tavern in Manhattan and brought petitioner outside (Gov. R., 28–30, 34–35, 37). Petitioner was then arrested by a third detective (Gov. R., 35, 44, 47, 50).[2] During a search of petitioner, the detectives found a large roll of twenty-dollar bills (Def. R., 16–17, 19; Gov. R., 28–29). Petitioner was taken to a nearby police station. While at the precinct station, one of the detectives noticed that the serial numbers on the individual bills were identical (Gov. R., 31, 42–43). When petitioner was asked where he had obtained the bills, he replied that he purchased them for three hundred dollars from a man named "John" (Gov. R., 31–32). The face value of the counterfeit twenty-dollar bills in the roll was between $1500 and $1600 (Gov. R., 3–4, 7, 28–29, 36–37).

Petitioner was later interviewed by a Secret Service agent. The agent told petitioner that he had a right to counsel and that he was not required to make any statement (Gov. R., 15). Petitioner said that he met a "Johnny" earlier that evening and that "Johnny" asked petitioner if he was interested in purchasing some "counterfeit money" (Gov. R., 3). Thereafter, petitioner gave three hundred dollars to "Johnny"

[2] There is nothing in the record to indicate the basis for petitioner's arrest. Petitioner was not arrested on a counterfeit charge, and the detectives did not realize until after they arrived at the precinct station that the bills taken from petitioner were counterfeit (Gov. R., 31, 42–43; 103; see Def. R., 19).

for eighty-two counterfeit twenty-dollar Federal Reserve notes (Gov. R., 3–4, 7, 21–22). Petitioner told the agent that he planned to "either sell them [the counterfeit notes] in bulk or pass them individually at a profit" (Gov. R., 4).

2. At the trial, petitioner testified that he sold three or four diamond rings to "Johnny," but did not know that the money he received was counterfeit (Gov. R., 57–58, 69–70, 78, 87–88). He said that he did not count the money which "Johnny" had given him and that he did not know "Johnny's" last name or where he lived (Gov. R., 72, 78). Petitioner said that, in order to avoid implicating a girl, he agreed to "go along" with the detectives (Gov. R., 64, 67, 82–83).

3. In its instructions to the jury, the court charged that petitioner was presumed innocent of the charges against him, and that the government bore the burden of proving guilt beyond a reasonable doubt (Def. R., 7, 9). The court further charged (Def. R., 10–11):

> And now, a word about the burden of proof, and this is always important in a criminal case. I told you the defendant is presumed to be innocent. The fact that he has been accused by a grand jury does not destroy that presumption. The burden of proof, in the sense of the responsibility of persuading you ladies and gentlemen, rests upon the government. The quantum or the measure of proof necessary before you lawfully can find the defendant guilty is referred to as proof beyond a reasonable doubt.
>
> Now, by a reasonable doubt I do not mean a positive certainty. Proof beyond a conceivable doubt cannot be reached in the world of actual-

> ity, and neither is a reasonable doubt a decision arbitrarily reached because a juror has a reluctance to perform an unpleasant task. Nor is it a disbelief that we have based upon the natural sympathy that we are supposed to have for one another.
>
> Reasonable doubt most nearly signifies one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully.
>
> And by weighing I do not mean balancing according to the greater volume of testimony, or the number of witnesses, or exhibits, but rather a determination based upon the convincing force of the witnesses' testimony.
>
> You are to be governed by quality and not necessarily by the quantity of the proof.

Petitioner objected to the foregoing instructions on the ground that the court made no mention of the fact that, if there was reasonable doubt in the minds of the jurors, they had the right and duty to acquit the defendant (Def. R., 12). The objection was overruled on the ground that the point had been covered in the instructions (Def. R., 12).

After the jury had retired to deliberate upon the case, the court received a note from the jury which read: "There is a question as to whether we can recommend lenieney" (Def. R., 13). The jury was then recalled into the court room. The trial judge answered the request as follows (Def. R., 13–14):

> I suppose by that you mean whether in returning your verdict you can recommend leniency. The answer is that if you arrive at a verdict of guilty you can recommend anything

you want, but I must tell you in the same breath that it has no weight with me. If the man is guilty, on me alone, on my conscience, is the question of sentence, but that doesn't prevent you from recommending anything you want. But I want it perfectly understood that if your verdict is that the man is guilty what punishment he should get is my problem, not yours at all.

ARGUMENT

1. Petitioner was arrested on December 15, 1960, the indictment was returned on September 15, 1961, petitioner pleaded not guilty on September 26, 1961, and his trial commenced on December 18, 1961. In that one-year period, petitioner made no motion to suppress the counterfeit bills taken from his person at the time of his arrest.

At the trial, the counterfeit bills were sought to be introduced in evidence through the Secret Service agent who had interviewed petitioner (Gov. R., 4). Petitioner's counsel was permitted to examine the agent on *voir dire* (Gov. R., 7–10). At the conclusion of the *voir dire*, the notes were received in evidence and petitioner's counsel specifically stated that he had no objection (Gov. R., 10). Counsel soon thereafter withdrew his consent and made an oral motion to suppress the evidence stating that there should be discussion of the cases "pertinent to the arrest of 'this defendant'" (Gov. R., 11). The motion was denied (Gov. R., 12). The motion was renewed and again denied after the New York City detective who arrested petitioner had testified for the government and been

cross-examined (Gov. R., 53–55). The motion was again renewed as part of the motion to dismiss at the close of the whole case, the court treating the motion as one "to dismiss because of the illegal search" (Gov. R., 109). The judge reserved decision on that motion to dismiss and subsequently denied it (Def. R., 2).

We submit that the motion to suppress was properly denied. Petitioner made no motion before trial, and did not even raise his objection at the trial until after the counterfeit bills had been introduced in evidence, specifically without objection. Rule 41(e), F.R. Crim. P., *supra*, p. 2, provides that a motion to suppress evidence "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Petitioner offered no explanation for his failure to file the motion before trial, much less a statement that "the defendant was not aware of the grounds for the motion." While this Court in its recent opinion in *Di Bella* v. *United States*, 369 U.S. 121, has indicated that the final ruling on a motion to suppress may sometimes be deferred until the criminal trial, this does not weaken the requirement of Rule 41(e) that notice of the claim should be given before trial by a motion to suppress, unless good reason for failure to file has been shown.

This case is a good illustration of why a motion to suppress should be filed before trial. The government in its brief in the court of appeals stated that it could have shown that the state officers did have probable

cause for the arrest of petitioner. Petitioner established on cross-examination of the New York detective who made the arrest that there was no arrest warrant but he did not ask the basis for the arrest (Gov. R., 34–37). In view of the fact that the counterfeit bills had already been accepted by the trial judge, the government did not undertake to develop the circumstances of the state arrest (Gov. R., 102–103). Petitioner notes that the detective who testified at the trial did not then know the names of the two other officers who went into the bar (Gov. R., 50–52). But this merely proves the desirability of a timely motion so that matters of this kind can be investigated.

The trial court was not required by Rule 41(e) to entertain petitioner's belated motion to suppress. This is particularly true since petitioner's motion came during the trial itself. A trial court is certainly not required to allow a digression from questions relating to guilt or innocence in order to conduct a hearing on a motion to suppress. We submit that in these circumstances, where a motion threatens to interfere with the conduct of the trial, the trial court has considerable discretion whether to entertain it. Here, the district court properly exercised its discretion when it refused to entertain petitioner's motion since petitioner offered no excuse of any kind for his failure to raise the issue before trial. See *Segurola* v. *United States*, 275 U.S. 106, 111–112; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Rosen*, 293 F. 2d 938, 941 (C.A. 5); *United States* v. *Chieppa*, 241 F. 2d 635, 638 (C.A. 2), certiorari denied *sub nom. Iricola* v. *United States*,

353 U.S. 973. See also *Jones v. United States*, 362 U.S. 257, 264.

2. Petitioner contends (Pet. 12–14) that the supplemental instructions, given in response to the note from the jury, together with the court's original charge on presumption of innocence, burden of proof, and reasonable doubt, "compelled" the jury verdict of guilty. As shown by the Statement, *supra*, the court adequately charged the jury that petitioner was presumed to be innocent of the charges and that the government bore the burden of proving the charges beyond a reasonable doubt. The court defined a reasonable doubt as "one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully" (Def. R., 11). The charge, taken as a whole, was correct and did not coerce a guilty verdict. Likewise, the court's supplementary instruction that the question of punishment was for the court, rather than for the jury, was proper. As the court below said (Gov. R., 138; Pet. App. 29), "This made it quite clear to any juror inclined to compromise that the verdict was not to be adulterated by considerations extraneous to the jurors' function."

There is likewise no merit in petitioner's contention (Pet. 8–12) that the instructions to the jury were erroneous because the judge did not charge that the jury should acquit petitioner if they entertained a reasonable doubt as to his guilt. As noted, the court repeatedly instructed the jury that the government bore the burden of proving guilt beyond a reasonable doubt—a term which it explicitly defined. Petitioner, however, claims that he was entitled to an instruction

that the jury must acquit if the government did not prove petitioner guilty beyond a reasonable doubt. This instruction would have added nothing to the charge which was given. Surely, the jury could not have failed to understand that unless the government bore its burden of proof beyond a reasonable doubt, they must acquit petitioner. Even assuming that petitioner's requested instruction would have improved the trial court's charge there would have been no significant difference. As the court below properly held, the trial court's failure to give petitioner's proposed notification did not constitute prejudicial error. See Rule 52, F.R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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